INVESTMENT COMPANY INSTITUTE

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April 17, 1995

Mr. William Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket Nos. 94-150, 92-51 and 87-154; FCC 94-324

Dear Mr. Caton:

The Investment Company Institute[1] appreciates the opportunity to comment on the Notice of Proposed Rulemaking ("NPRM") relating to the Commission's review of its broadcast media attribution rules. Our comments focus in particular on the Commission's proposal to increase the attribution benchmark for certain passive investors from 10 percent to 20 percent of a media company's voting stock. In a previous comment letter on this matter dated June 10, 1992, the Institute urged the Commission to adopt this proposal. We continue to support this proposed change for the reasons discussed below.

As noted above, under the Commission's attribution rules in their current form, certain passive institutional investors, including mutual funds, are subject to a 10 percent benchmark. While it is unlikely that an individual mutual fund would own more than 10 percent of any one broadcast company,[2] we understand that the Commission's rules provide that the holdings of mutual funds under common management must be aggregated for purposes of applying the attribution benchmark. It is not unusual for the aggregate holdings of funds under common management to reach the 10 percent benchmark, particularly since many broadcast companies are relatively small. To avoid the burdensome consequences of exceeding this benchmark, individual funds are restricted to investing in amounts less than 10 percent. Our members

[1] The Investment Company Institute is the national association of the American investment company industry. Its membership includes 5,528 open-end investment companies ("mutual funds"), 473 closed-end investment companies and 12 sponsors of unit investment trusts. Its mutual fund members have assets of about $2.170 trillion, accounting for approximately 95% of total industry assets, and have over 38 million individual shareholders.

[2] For example, many mutual funds are prohibited by their investment policies from holding more than 10 percent of an issuer's outstanding voting securities. In addition, most funds have policies prohibiting them from investing for the purposes of management or control.

have indicated that increasing the attribution benchmark for aggregate fund holdings to 20 percent likely would lead to additional investment by mutual funds in the broadcast industry.[3]

With respect to the Commission's request for assurances that increasing the attribution benchmark for passive institutional investors to 20 percent would not thwart the purposes of the attribution rules, we reiterate our view that there is little cause for concern about the possible exertion of undue influence by mutual funds that invest in broadcast companies. In this regard, as indicated in footnote 2 above, many mutual funds have investment policies that restrict ownership of the outstanding voting securities of any one issuer to 10 percent. Also, most mutual funds have investment policies prohibiting them from investing for purposes of management or control.[4] Thus, such funds do not seek seats on the boards of directors of companies in which they invest, nor do they seek to influence the day-to-day management of those companies or otherwise take an activist role with respect to companies represented in their portfolios.

We further note that, in a section of the NPRM dealing with the general attribution benchmark, the Commission has requested information on other agency benchmarks that may provide useful analogies. We believe Rule 16a-1 under the Securities Exchange Act of 1934 ("1934 Act") serves this purpose. Under Rule 16a-1, for purposes of determining whether an entity is a "ten percent holder" that may be subject to reporting requirements and short-swing profit restrictions under Section 16, certain institutions and persons (including registered investment companies and investment advisers) are not considered the beneficial owners of securities "held for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business . . . as long as such shares are acquired by such institutions or persons without the purpose or effect of changing or influencing the control of the issuer . . . ."[5] In connection with adopting Rule 16a-1 in its current form, the SEC stated that "Section 16, as applied to ten percent holders, is intended to reach those persons who can be presumed to have access to inside information because they can influence or control the issuer as a result of

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[3] Although we are not in a position to comment on the specific degree of increased investment that would result, we note that since the current attribution benchmarks were adopted in 1984, the assets of equity mutual funds have grown from $83.1 billion (as of December 31, 1984) to $909.1 billion (as of February 28, 1995). It seems apparent that more of this over ten-fold increase in the pool of equity fund assets could have been channeled into the broadcast industry, if it were not for the 10 percent attribution benchmark.

[4] It also should be noted that under Section 2(a)(9) of the Investment Company Act of 1940, a mutual fund that owns more than 25 percent of the voting securities of a company is presumed to control such company and, conversely, a mutual fund that does not own more than 25 percent of the voting securities of a company is presumed not to control such company.

[5] 1934 Act Rule 16a-1(a)(1). The staff of the SEC's Division of Investment Management has confirmed that the phrase "for the benefit of third parties or in customer or fiduciary accounts" encompasses mutual funds' portfolio securities. Mario J. Gabelli (pub. avail. April 30, 1991) (SEC staff "no-action" letter).

their equity ownership."[6] Consistent with this goal, Rule 16a-1 excludes certain securities holdings on the basis that they do not involve changing or influencing control of the issuer.

The Institute believes Rule 16a-1's treatment of passive institutional investors is pertinent to the Commission's consideration of an increase in the attribution benchmark for passive investors, because it is based upon the premise that the securities holdings of passive institutional investors meeting its terms do not raise concerns about influencing or controlling the issuer.[7] We agree with the SEC's conclusion and believe it provides a basis upon which the Commission could determine that increasing the attribution benchmark for passive investors is appropriate.

The Institute further suggests that the Commission reconsider its inclination not to make registered investment advisers eligible for treatment as passive investors for purposes of the attribution rules. In this regard, we point once again to Rule 16a-1 which, as noted above, treats registered investment advisers as passive investors insofar as they are investing for the benefit of third parties or in customer or fiduciary accounts, and not with the purpose or effect of changing or influencing control of the issuer.[8] We recommend that registered investment advisers be subject to the higher attribution threshold for passive investors (ideally, 20%) with respect to holdings meeting these conditions.

Thank you for considering our comments.

Sincerely,

Frances M. Stadler

Frances M. Stadler
Associate Counsel

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[6] 1934 Act Release No. 28869 (February 8, 1991) at page 14.

[7] In footnote 86, the NPRM cites the Commission's 1984 Attribution Order, which concluded that Section 16 of the 1934 Act was not an appropriate model for the attribution rules. The Institute urges the Commission to reconsider this conclusion, especially in light of the 1991 amendments to Rule 16a-1 and related commentary by the Securities and Exchange Commission, as discussed above.

[8] Similarly, Rule 13d-1 under the 1934 Act provides a simplified, abbreviated requirement for specified types of passive institutional investors (including both registered investment companies and registered investment advisers) to report their ownership of certain equity securities.